

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JAN 27 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0300-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
FRANCISCO MORENO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082977

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.
By Brick P. Storts, III

Tucson
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Petitioner Francisco Moreno seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Moreno has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Moreno was convicted of conspiracy to sell a narcotic drug. The trial court sentenced Moreno to a partially mitigated, seven-year prison term. Moreno appealed, arguing the evidence was insufficient to support his conviction, and this court affirmed his conviction and sentence. *State v. Moreno*, No. 2 CA-CR 2010-0056, ¶¶ 1, 9 (memorandum decision filed Dec. 22, 2010). Our mandate issued on March 11, 2011.

¶3 On April 21, 2011, forty-one days thereafter, Moreno filed a notice of post-conviction relief.¹ In his petition filed in June 2011, Moreno argued that trial counsel had been ineffective by failing to move to preclude the testimony of the detective who had interviewed Moreno, by failing to move before trial to suppress a portion of Moreno’s statement to the detective, by allowing the jury to hear references he made in the statement to various other acts, by stating, in her opening statement, that Moreno had been on probation at the time of the offense, and by calling Moreno’s probation officer as a witness. The trial court summarily denied relief, concluding Moreno’s “underlying claim has been finally adjudicated on the merits in the appellate process and as such is precluded from being raised under the guise of ineffective assistance of counsel.” The court additionally concluded that Moreno had failed to state a claim for relief based on ineffective assistance of counsel because “the trial tactic employed was reasonable.”

¶4 On review, Moreno contends the “trial court abused its discretion in finding [his] claim of ineffective assistance of counsel precluded pursuant to Rule 32.2(A)(2)” and in summarily denying relief. We disagree. Although Moreno’s claim may not have

¹In the notice, Moreno’s counsel stated he had “previously executed a Notice . . . on behalf of the Defendant and filed same on April 12, 2011,” but the record before us contains no such filing. In any event, a petition filed on that date would also have been untimely. And, the time limits for filing a notice of post-conviction relief “are jurisdictional.” A.R.S. § 13-4234(G).

been subject to preclusion on the ground the court cited, *see State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002), Moreno’s notice of post-conviction relief was untimely, *see* Ariz. R. Crim. P. 32.4(a) (“In all other non-capital cases, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later.”). And “[a]ny notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).” *Id.* But the only claims Moreno raised in his notice and petition were based on Rule 32.1(a), *see State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d 637, 641 (App. 2010), and, pursuant to Rule 32.4, therefore were time-barred. Because Moreno’s claims were subject to dismissal on this basis alone, the court did not abuse its discretion in denying post-conviction relief. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (fact trial judge comes to proper conclusion for wrong reason irrelevant; appellate court obliged to affirm trial court’s ruling if result legally correct for any reason). Thus, although we grant the petition for review, we deny relief.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge